Michigan Journal of International Law

Volume 39 | Issue 2

2018

International Courts Improve Public Deliberation

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INTERNATIONAL COURTS IMPROVE PUBLIC DELIBERATION

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INTRODUCTION

Critics of international courts call attention to the fact that these courts remove important decisions from domestic democratic bodies and shift them to unelected international bodies.[1] To curb the ability of international courts to seize decision-making power from domestic bodies, international courts are usually limited by legal principles of judicial deference, such as the principle of subsidiary and the margin of appreciation.[2] These rules constrain international courts and prevent them from making certain decisions.

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1. *See generally* LORD SUMPTION, THE 27TH SULTAN AZLAN SHAH LECTURE, KUALA LUMPUR: THE LIMITS OF LAW, 9–15 (Nov. 20, 2013), https://www.supremecourt.uk/docs/speech-131120.pdf (arguing that the European Court of Human Rights suffers from a democratic deficit because it substitutes the decisions of publicly elected domestic bodies).

2. *See* Shai Dothan, *Introduction to the Symposium Issue: Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies* (forthcoming 2018) J. INT'L

Scholars have argued that although international courts may possess worse democratic credentials than domestic bodies, there are situations in which the margin of appreciation should be narrowed because democratic failures hinder domestic bodies from making proper decisions.[3] The narrowing of the margin of appreciation allows international courts to make their own decisions, even against domestic policies. In these situations, the judgment of the international court may be more in line with democratic principles than are the decisions domestic bodies can make by themselves. Some scholars have argued that international courts like the European Court of Human Rights (ECtHR) take this factor into account and give less deference to states when there are doubts about the quality of their domestic democratic process.[4]

This answer to the critics may address the content of international judgments, but it leaves open another problem. Even if the decision that an international court makes is better per se, that decision is still taken away from democratic bodies. Public deliberation—which is essential for democracy to persist—does not take place. Without public deliberation, the ability of democratic bodies to function in future situations is hampered and enervated.[5]

But this argument ignores all that happens after an international court issues its judgment. The judgment of an international court is never the last word on an issue. States will react to the judgments issued against

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DISPUTE SETTLEMENT (2018) (defining the margin of appreciation doctrine—a doctrine devised by the European Court of Human Rights to regulate when it should and when it should not intervene in the policy choices of countries. The principle of subsidiarity is related to the margin of appreciation as it is the general principle that protects domestic bodies from international intervention. The paper suggests that the margin of appreciation is usually justified with reference to the claim that domestic bodies are either better or more legitimate decision-makers, but it is often applied because of political necessity rather than normative justifications); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 919-921 (2006) (explaining that a potential justification for the application of the margin of appreciation doctrine by international courts is that international courts are not democratically accountable).

3. *See* Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. INT'L L. POL. 843, 849 (1999) (arguing that the ECtHR should narrow the margin of appreciation in cases which concern minorities, because they are not properly represented by the democratic process). Shai Dothan, *In Defence of Expansive Interpretation in the ECHR*, 3 CAMBRIDGE J. INT'L & COMP. L. 508 (2014) (arguing that the ECtHR should be allowed to use expansive interpretation in cases of potential democratic failures).

4. *See* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 27–31 (2012); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CON. L. 1023, 1042 (2012); Oddný Mjöll Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights*, 14 HUM. RTS. L. REV. 647, 664–65 (2014).

5. *See* Lord Sumption, *supra* note 1, at 15 (suggesting that taking away decisions from democratic bodies and transferring them to courts can lead to a slow process of democratic decline).

them, and the public will debate them. Consequently, international courts can foster rather than forestall democratic deliberation.

In addition, international courts improve democratic deliberation because they can supply legal arguments that initiate a more elaborate and a more fruitful debate. The legal language used by international courts transforms debates about pure political interests into debates about rights that are grounded in legal theory.

International courts also have a positive effect on the actors who engage in deliberation and on the way this deliberation takes place. International courts provide useful arenas for training the future leaders of international law and for creating social contacts between international lawyers. International courts provide social arenas in which fruitful deliberation can take place. This paper uses the tools of Social Network Analysis, a powerful social science methodology, to demonstrate the ways international courts improve the information flow between segments of the public engaged in deliberation.

The paper starts with the effects of international courts on the broader public and narrows down to their influence on a small elite of lawyers. Part I suggests that international courts captivate the public imagination, allowing citizens to articulate their rights. Part II demonstrates how governments, parliaments, and national courts around the world interact with international courts in ways that improve public deliberation. Part III studies the global elite of lawyers that work in conjunction with international courts to shape policy. Part IV concludes by arguing that the dialogue fostered between international courts and democratic bodies does, in fact, lead to more vibrant democratic deliberation.

I. The General Public: From Interests to Rights

A. *The Myth of International Courts*

When people cut in line in front of a supermarket in Russia, one sometimes hears the crowd threaten them with an application to the ECtHR in Strasburg.[6] Conscientious objectors in Israel sometimes threaten the army officers that imprison them with prosecution at the International Criminal Court (ICC) in The Hague.[7] These statements are legal nonsense, but they may reflect the most significant impact that international courts have today on the actual behavior of countries.

International courts capture the imagination of the public. The layperson seems to think that these courts are incredibly powerful beings, with an enormous impact on her everyday life. If people only knew how weak

6. Skype conversation with Russian NGO activist Nov. 15, 2016.

7. *See* Dalia Karpal, *The Story of the Struggle of the Conscientious Objector Natan Blanc*, Haaretz (May 30, 2013), http://www.haaretz.co.il/magazine/.premium-1.2033798 (Hebrew) (where the conscientious objector Jonathan Ben-Artzi—whose story of refusing to report for mandatory military service attracted much attention in the Israeli media—relates how he threatened the senior officer who sent him to prison with future prosecution by an international court. He told the press that the officer judged him for a long period in prison and when he returned before her once again, she transferred his case to her superior officer).

and slow most international courts are, they would fear these courts much less or, alternatively, find other institutions to admire.[8] As it is, international courts owe a lot of their significance to pure ignorance—the public believes they are strong, and this false belief becomes their primary source of strength.

Maybe the word ignorance is a bit misleading. People do know that international courts exist. As far as the empirical evidence goes, they are even interested in them. People search for the ECtHR and the Court of Justice of the European Union (CJEU) on Google, and popular newspapers regularly cover the judgments of these two courts.[9] But the depth of knowledge even about these highly salient courts leaves much to be desired. This is evident from the fact that many newspapers mistake one court for the other.[10] In fact, many of the British citizens that voted to exit the European Union in the so-called Brexit probably thought this move would permanently absolve them from the censure of the ECtHR, which actually covers all members of the Council of Europe.[11]

A vivid example of the way international courts changed the global arena is the viral internet campaign *Kony 2012*. This campaign—which centered around a half-hour YouTube clip with more than 100 million views by 2016—called on the public to put pressure on their representatives to help arrest militia leader Joseph Kony.[12] The strategy behind the campaign was to change the world from the bottom up. The underlying idea was that every individual that hangs a poster in favor of Kony's arrest or sends a letter to a senator can make a difference.

Coordinating the public is a difficult task. Most of the public is uninformed and indifferent and has little effect on politics. This is exactly why most people lie at the mercy of small and well-organized interest groups that control the political arena.[13] International courts are a way to get peo-

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8. *See* Kyle T. Jones, *The Many Troubles of the ICC*, NAT'L INTEREST (Dec. 6, 2012), http://nationalinterest.org/commentary/the-many-troubles-the-icc-7822?page=3.

9. *See* Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14.2 THEORETICAL INQUIRIES IN L. 411, 419-423 (2013).

10. *See id.* at 422.

11. *See* Tim Worstall, *Misunderstanding Brexit—Scrapping The Human Rights Act for a British Bill of Rights*, FORBES (Aug. 23 2016), https://www.forbes.com/sites/timworstall/2016/08/23/misunderstanding-brexit-scrapping-the-human-rights-act-for-a-british-bill-of-rights/#36241934e25f (explaining that many people, and many politicians, misunderstand the Brexit. Contrary to what some may think, the British Human Rights Act cannot be changed in a way that denies rights protected by the European Convention on Human Rights—even after the Brexit, simply because the European Convention applies to the Council of Europe, not to the European Union).

12. *KONY 2012*, YOUTUBE (Mar. 5, 2012), https://www.youtube.com/watch?v=Y4MnpzG5Sqc.

13. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS, 33–34 (1965) (arguing that in a big group every member receives only a small share of the benefits obtained by the group, reducing the incentive of members of big groups to invest in the group's collective interest. This gives an important advantage to small interest groups); MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 74 (1982) (explaining how the superior

ple informed and motivated. The fact that Kony was indicted by the ICC helped to create awareness of his crimes. Furthermore, it helped cement an effective public campaign behind the idea that there is a forum where Kony can be brought to justice. While Kony remains a fugitive, the idea that somewhere in The Hague there is a court that will prosecute the most heinous war crimes is incredibly powerful. It gives the public a sense that they can affect politics, as well as a sense of purpose that they never had before.[14]

The myth of international courts is the key to their impact, but these courts are more than just a symbol. There are several mechanisms that are critical to their success. These mechanisms will now be addressed.

B. *Supplying Arguments for Public Debate*

Few, if any, international courts have an authority that directly commands the attention and compliance of the public itself.[15] Nevertheless, international courts do have a profound impact on the public debate. They form an arena, imperfect as it may be, that is not motivated solely by naked power, an arena that is susceptible to arguments about legal rights.[16]

Scholars have noted this role—shifting the discourse from power to rights—as one of the key functions that courts serve in society. Courts interpret vague documents that leave plenty of room for differences of opinion and contesting theories.[17] Yet despite the discretion the ambiguity of legal language gives judges, they are not free to decide these cases as

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ability of small groups to organize compared to big groups is likely to have harmful economic implications); Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92.4 AMER. POL. SCI. REV. 809, 812 (1998) (suggesting that members of big groups face difficulties when they try to inform themselves about the actions of their representatives); Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985) (concluding that big groups are sometimes the most socially vulnerable).

14. *See ICC: First Lord's Resistance Army Trial Begins – Thousands of Victims Participating in Case,* HUM. RTS. WATCH (Dec. 5, 2016), https://www.hrw.org/news/2016/12/05/icc-first-lords-resistance-army-trial-begins.

15. *See* Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & CONTEM. PROBS. 1, 11–12 (2016) (explaining that international courts usually do not have so-called *popular authority*, namely their rulings do not have an authority that is recognized directly by the general public).

16. *See* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 63–69 (2015) (describing the legal constraints on international courts that determine their judgments together with the political constraints they are subject to).

17. *See* H. L. A. HART, THE CONCEPT OF LAW, 124–26 (1961). In addition to the ambiguity of language, American Legal Realists argued that judges have discretion because there are usually multiple legal rules pertaining to the same issue and because the application of law to facts naturally involves discretion. *See* Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261, 266–67 (Patterson ed., 1996); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO. L.J. 607, 614–16 (2007). Some scholars argue that judicial discretion is even wider in international law, because international law includes rules that rely on contradictory goals and reasons and do not come together to form one coherent system. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, 590–91 (2005).

they please.[18] Judges must provide reasons for their decisions that rely on the values enshrined in the texts that guide them.[19] The values that the judges identify and the forms of argument that they use can later guide the public debate within society. In this way, judges do not silence the debate. Instead, they turn the debate into a discussion about values and principles.[20]

Judgments can provide depth and meaning to public values because they concretely apply these values to specific situations.[21] Judgments can therefore teach the public how to argue for their rights and enrich public deliberation. Scholars have argued that national courts are tasked with fulfilling this role,[22] but international courts at the beginning of the twenty-first century seem more capable than ever of playing it as well.

A way to address the impact of international courts on public debate is to look for situations in which these courts changed the legal discourse outside of their formal jurisdiction. In these situations, judges who are not formally bound by the judgments of an international court nevertheless refer to these judgments and learn from their reasoning. One can only assume that if an international court manages to crystallize public debate in another country that is not bound by its judgments, the effect on discourse in the areas under the court's jurisdiction will be even greater.

The examples that follow include judgments of supreme courts in several countries. These judgments rely on principles put forward by international courts that do not have binding jurisdiction in that country. If these principles impact the highest level of the judiciary in foreign jurisdictions, this may indicate a general change of discourse precipitated by international courts.

The first example demonstrates the impact of an international court on the U.S. Supreme Court, a court known for its policy of American exceptionalism and its reluctance to learn from foreign law.[23] Justice Anthony Kennedy, who delivered the opinion of the Court in the landmark case *Lawrence v. Texas,*[24] decided to overrule *Bowers v. Hardwick*,[25] a Supreme Court case which had only recently found the criminal-

18. *See* AHARON BARAK, JUDICIAL DISCRETION 35–46 (Yadin Kaufmann trans., 1987).

19. *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

20. *See* Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 34 (2003).

21. *Cf.* Ferderick Schauer, *Do Cases Make Bad Law?* 73 U. CHI. L. REV. 883, 884 (2006) (criticizing the idea that deciding cases based on concrete disputes leads to superior results and calling attention to the fact that concrete factual situations may distort judges).

22. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29–30 (1979); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 125 (1982).

23. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 439 (2005) (explaining that it was "virtually unprecedented" for Justices of the U.S. Supreme Court to use foreign judgments to assist in the interpretation of the United States Constitution).

24. Lawrence v. Texas, 539 U.S. 558 (2003).

25. Bowers v. Hardwick, 478 U.S. 186 (1986).

ization of sodomy to be constitutional. The concurring judgment of Justice Warren Burger in *Bowers* asserted that criminalizing homosexual conduct is prevalent in Western civilization and supported by "Judeo-Christian moral and ethical standards,"[26] an assertion that Justice Kennedy tried to disprove. As evidence that Western civilization does not unanimously endorse criminalizing homosexual conduct, Justice Kennedy referred to the ECtHR case of *Dudgeon v. United Kingdom*.[27] This case held that criminalizing consensual homosexual sex between adults violates the European Convention on Human Rights.[28] The reference to the ECtHR does not reflect any legally binding obligation to uphold its judgments. Instead, it demonstrates a change in the discourse and the public perception that was initiated, in part, by the judgment of an international court.

Another illustrative example is the dissent written by Judge Michael Kirby in the High Court of Australia case of *New South Wales v. Amery*. Kirby expansively interpreted the Australian Anti-Discrimination Act, reading it as the culmination of national and international developments directed at correcting the unfair payment of different salaries based on gender to workers doing essentially the same work. Kirby decided that the purpose of judgments of the European Court of Justice (ECJ) enforcing the European law principle of "equal pay for equal work" was sufficiently similar to the purpose of anti-discrimination legislation in Australia to justify learning from these international judgments. Kirby took note of ECJ judgments that view differences in payment of women and men as presumptively contrary to European law, unless the differences can be justified by objective factors that are not discriminatory. He argued that in light of such judgments, it would be wrong to construe Australian legislation narrowly. Australian courts, he asserted, should be willing to intervene when employers set unreasonable requirements that discriminate on grounds of sex.[29] Although Kirby wrote only the dissent in this case, his judgment demonstrates how a general principle—equal pay for equal work—that was championed and developed by the ECJ has an impact on judicial opinions in states that are nowhere near the jurisdiction of that international court.[30]

Another example of the influence of international courts outside their jurisdiction concerns an Israeli judgment that prohibited the use of certain interrogation techniques on suspected terrorists. One of these interrogation techniques was known as "Shabach." It included handcuffing the interrogated person, sitting him on a low and especially uncomfortable chair,

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26. *Id.* at 196 (Burger, J., concurring).

27. Lawrence v. Texas, *supra* note 24, at 572–73.

28. Dudgeon v. the United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

29. *The State of New South Wales v. Amery and Others*, [2006] HCA 14 ¶¶. 168–71 (Austl.).

30. This is just one example demonstrating the way non-binding international judgments had an influence on anti-discrimination law in Australia. This influence is noted in HUMAN RIGHTS AND EQUAL OPPORTUNITY COMM'N, EQUAL PAY HANDBOOK (1998), https://www.humanrights.gov.au/sites/default/files/content/pdf/sex_discrim/equal_pay.pdf.

covering his head with an opaque bag, and subjecting him to noisy music.[31] The Israeli High Court of Justice decided that this interrogation technique was illegal and conducted without authority.[32]

The Israeli court referred to the ECtHR judgment of *Ireland v. United Kingdom*.[33] This judgment decided that similar, but not identical, techniques used by the United Kingdom violated the European Convention on Human Rights because they constituted inhuman and degrading treatment, even if they did not cause enough suffering to be considered torture.[34] The Israeli court was clearly influenced by the moral standards promoted by the ECtHR, although Israel does not fall under the jurisdiction of the European Convention on Human Rights.

These cases suggest that international courts exert an influence that exceeds the binding force of their judgments. They frame the public debate by defining principles such as equal pay for equal work. These principles become the starting point of any informed discussion on the subject. Even if lawyers or political parties want to diverge from these principles, they cannot ignore them.

International courts also uphold moral standards that become an international norm. Countries that wish to deviate from this norm will signal to the international community that they do not care enough about their international standing to pay the costs involved with conforming to internationally-accepted standards. This is a dangerous signal as it can damage the state's international reputation and affect the way other countries perceive its credibility.[35]

C. *Forming Communities of Activists*

International courts are not just elitist institutions populated by a small group of professional judges who hear arguments from a closed circle of top counselors.[36] Today, international courts such as the ECtHR and

31. HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) IsrSC 817, ¶ 26 to the judgment of the President Aharon Barak (1999).

32. *Id.* at ¶ 30.

33. *Id.*

34. Ireland v. The United Kingdom, 25 Eur. Ct. H. R. (ser. A), at ¶ 167 (1978).

35. *See* ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS – A RATIONAL CHOICE THEORY 34–35 (2008) (explaining that violating international law damages states' reputation by signalling they do not care about their standing in the international community. This signal suggests the state is willing to forgo future benefit for an immediate gain, a quality that makes states a less reliable treaty partner and will lead to worse deals in future negotiations). My research mentioned in *infra* note 37 provides empirical support for the argument that reputational damage is caused to states when they disobey international courts. That paper concluded that states strive to protect their international reputation and the better their current reputation, the more states are willing to pay to preserve it.

36. *See* Sara Dezalay & Yves Dezalay, *Professionals of International Justice from the Shadow of State Diplomacy to the Pull of the Market of Arbitration*, *in* INT'L LAW AS A PROFESSION (eds. Andre Nollkaemper et al) 11, 13 (suggesting that the group of counselors arguing before the International Court of Justice is small and highly connected, with difficult barriers of entry).

the Inter-American Court of Human Rights (IACHR) are still staffed by a small core of legal professionals, but this core is connected, in turn, to a much larger periphery of lawyers and activists. The impact that international courts have on society is partly due to the dense connections between the elite core of lawyers and the larger periphery surrounding them.

The ECtHR is constantly looking for ways to improve its connections with non-governmental organizations (NGOs) and human rights activists. In 2011, the Committee of Ministers—the body charged with enforcing ECtHR judgments—launched a new publicly available website. This website is dedicated to publishing reports by NGOs that document states' non-compliance with ECtHR judgments. In the first four years of the website's existence, more than two hundred organizations submitted reports that were published on the website. Numerous reports were submitted collectively by several NGOs and led to cooperation across organizations.[37] This large group of highly-motivated activists opens new avenues for the court to influence public discourse.

Empirical research that I conducted shows that those NGOs focus their reports on the most severe violations and the most legally–important judgments issued by the ECtHR.[38] This finding suggests that the community of NGOs which submitted reports collectively process information in an efficient way. They form what is known in Social Network Analysis as a "bandwidth network"—a network that minimizes the biases of its members and leads to increasingly accurate collective assessments. This type of network contrasts with "echo networks," which intensify biases held within the group during the process of communication.[39]

What makes the network of NGOs a bandwidth network? First, the relative independence of NGOs from one another decreases the chances that NGOs will be pressured to follow the assessments of others.[40] Second, the NGOs in the group are very different from one another. They vary in size. Their staff come from different countries and different cultures, and they have different specializations and skills. Because the NGOs are so different, they are likely to have different worldviews and to voice argu-

37. *See* Shai Dothan, *A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States,* 27 DUKE J. COMP. & INT'L. L. 141 (2017). *See also Submissions from States, applicants, NGOs and NHRIs,* COUNCIL OF EUROPE, https://www.coe.int/cs/web/execution/submissions (last visited Mar. 21, 2018).

38. *See* Dothan, *supra* note 37 at 149–59.

39. *See* RONALD S. BURT, BROKERAGE & CLOSURE: AN INTRODUCTION TO SOCIAL CAPITAL 167–68 (2005).

40. *See* Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AMER. J. SOC. 1420, 1423, 1429 (1978) (explaining that close connections between group members mean that only a few members are necessary to exert a pressure on others to conform and form a so-called "cascade" of views.). People may follow one another because of social pressure, what is known as "reputational cascades," but they may also follow one another because they try to learn from the views of others. Trying to learn from others may sometimes propagate mistakes and lead to so-called "informational cascades"; *see* Eric Posner & Cass Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 161–63 (2006).

ments that balance each other out instead of reinforcing existing biases.[41] Third, every NGO has a specific agenda and clear tasks, a quality that experiments have shown limits the deterioration of groups to extreme views in the process of deliberation.[42] All these qualities make the assessments of this large group of human rights activists realistic and sound.[43]

The community of NGOs is therefore a useful tool for disseminating accurate information about the ECtHR and its judgments. Social Network Analysis shows that the network structure that surrounds the ECtHR—which includes a small core of elite professionals and a large periphery connected to it—promotes the flow of information within the network as a whole. Research in epidemiology shows that social groups that have a densely connected core (for example, people with many sexual partners) that connects with the larger periphery (that is, have sex with people who have only a few sexual partners), a process known as "dissortative mixing," are likely to spread diseases more quickly than groups that have a more disconnected core and periphery.[44] The same logic that works for sexually transmitted diseases works for information. The core of elite professionals is where the ideas that shape international courts are born and developed. But the true social impact of the court comes from the connections that this group has with a much larger group of lawyers and activists interacting with the court and its enforcement bodies.

The ECtHR is using the social network described above to assist with the enforcement of its judgments. This may be a useful tool because the ECtHR enjoys relatively high rates of compliance and can aspire to change the world directly through the enforcement of its judgments.[45]

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41. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes?* 110 YALE L. J. 71, 89–90 (2000) (explaining that when group members are only exposed to a limited and biased set of arguments, they are likely to shift to more extreme views).

42. *See* CASS. R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 111–12 (2015).

43. *See* Shai Dothan, *Social Networks and the Enforcement of International Law*, *in* EDWARD ELGAR RES. HANDBOOK ON THE SOC. OF INT'L L. (Andrew Lang & Moshe Hirsch eds., forthcoming 2018).

44. *See* Edward O. Laumann & Yoosik Youm, *Racial/Ethnic Group Differences in the Prevalence of Sexually Transmitted Diseases in the United States: A Network Explanation*, 26 SEXUALLY TRANSMITTED DISEASES 250 (1999).

45. The exact rates of compliance with ECtHR judgments are difficult to measure. Besides problems with acquiring the relevant information, one must consider, for example, how to treat cases of delayed compliance or compliance with only part of the dictates of the judgment, *see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 65–66 (2005) (explaining that it is difficult to reach conclusive results on the ECHR's compliance rates). However, most of the sources that tested the ECtHR's compliance rates find them to be very high, *see* R. Ryssdal, *The Enforcement System set up under the European Convention on Human Rights*, *in* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 49, 67 (M.K. Bulterman & M. Kuijer eds., 1996) (claiming that there are virtually no cases of noncompliance, although there are some cases of delayed or partial compliance); Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L. REL. 157, 171 (1995); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 296 (1997).

Other courts, for example the IACHR, do not have this privilege. The IACHR faces such low rates of compliance that it must settle for shaping society in a more indirect way than enforcing its judgments.[46]

By exposing information about violations and acting, in essence, as a stage where arguments are presented in front of the public, the IACHR can influence long-term social processes in the countries under its jurisdiction. Research shows that IACHR judges understand part of their judicial role as related to disseminating information in this way.[47] This leads to forms of judicial behavior that may seem odd when compared to those of courts that are committed to ensuring compliance with their judgments. For example, the IACHR does not simply close a case when a state accepts responsibility for its actions. Instead, the court will follow up on acceptance of responsibility with days of hearing, collecting evidence from witnesses, and presenting and analyzing the relevant facts.[48] All these actions do not affect immediate compliance—since the state already admitted it is guilty of misconduct—but they expose and disseminate information about state practice, leading to a long-term impact on future conduct of states in the region.

The information disseminated by courts reaches far beyond public officials. This information is regularly reviewed in the media, even if it is often reviewed inadequately.[49] The media spreads this information to the public. Armed with this information, the public exercises its influence on state administration from the bottom up.

Certainly, some members of the public, such as human rights lawyers, have a greater influence on the political and legal conditions in their states.[50] But every person who acts based on the values and principles set forth by international courts can make a difference. Every person who votes, or participates in demonstrations, or writes to the local newspaper can exert an influence that reaches all the way to the highest echelons of power.[51]

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46. *See* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L. L. J. 493, 504 (2011) (arguing that states complied with only one out of ten IACHR judgments); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L. L. 768, 786 (2008) (assessing the rates of compliance with the IACHR as 11.57%); Posner & Yoo, *supra* note 45, at 43 (estimating a five percent compliance rate with the IACHR).

47. *See* Cavallaro & Brewer, *supra* note 46 at 816–17.

48. *See id.* at 808–16.

49. *See supra* note 10.

50. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (describing so-called "norm entrepreneurs" that can cause an especially significant change to the norms in their society); Harold Hongju Koh, *Why Do Nations Obey International Law?,* 106 YALE L. J. 2599, 2612 (1997) (describing the work of "transnational moral entrepreneurs" who had a strong impact on the development of international law).

51. *See* Harold Hongju Koh, *How is International Human Rights Law Enforced?* 74 IND. L. J. 1397, 1416 (1999) (explaining how individuals can promote the enforcement of international human rights law as part of a so-called "transnational legal process").

Traditionally, international law has developed when diplomats from different countries met and tried to further their state interests. The interesting interactions happened between the tip of the pyramids of political power, in an environment that was closed off from most segments of the public.[52] Now, we live in what scholars have called, "a new world order," a world in which most of the influential interactions take place between mid-level bureaucrats across national boundaries.[53] National judges talk to each other,[54] as do members of the executive, the military, and the banking system in different states. The networks that form between these professionals can generate political changes that fall beneath the radar of international law.[55]

This may be a dangerous development for those who believe in the authority of international law.[56] Yet it also forms an opportunity for those who believe in influence from the bottom up. If influential developments are not limited to connections between the very top of national hierarchies, people can shape the international arena by more directly influencing mid-level professionals in their own country. Filing a case in a national court can have an immediate international influence because national judges are now part of their own global network, without the mediation of professional diplomats.[57]

The analysis above suggests that international courts do not just promote deliberation; the public deliberation that international courts initiate has a real impact on state behavior. Public officials may be unconstrained by international law, but they are constrained by the public, and the public, in turn, is molded by international courts.

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52. *See* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 184–86 (1999) (explaining that treaty negotiation and, to a lesser extent, treaty ratification are controlled by government representatives of the executive and subject to minimal public scrutiny. These government representatives could be easily captured by interest groups).

53. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

54. *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).

55. This phenomenon was dubbed "informal international law." *See* Joost Pauwelyn, Ramses A. Wessel, & Jan Wouters, *An Introduction to Informal International Lawmaking, in* INFORMAL INTERNATIONAL LAWMAKING (eds. Joost Pauwelyn, Ramses A. Wessel, & Jan Wouters, 2012) 1, 3.

56. *See* Armin von Bogdandy, Philipp Dann, & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L. J. 1375, 1400 (2008) (explaining the importance of global governance by institutions which are part of public international law); Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 15, 16–17 (2005) (arguing that the transnational effects of policy in a globalized world create a problem of accountability. The growing field of Global Administrative Law studies mechanisms to solve this problem).

57. *See* Joost Pauwelyn, Ramses A. Wessel, & Jan Wouters, *The Exercise of Public Authority through Informal International Lawmaking: An Accountability Issue?*, Jean Monnet Working Paper 06/11, 11–12, http://doc.utwente.nl/81510/1/JMWP06Wessel.pdf.

II. Governments: Pre-emption and Strategy

International courts are constrained institutions. They are never completely free. States can limit the ability of international courts to act and decide cases. The literature differentiates between mechanisms used to constrain courts before they make their decision—for example by clearly defining treaty terms—and mechanisms used to constrain courts who already issued decisions states disagree with. States can demonstrate this disagreement by failing to comply with a decision, exiting a court's jurisdiction, cutting a court's budget, and so on.[58] What mechanisms used to limit the court and mechanisms used to punish it have in common is that they both try to shape the court's judgments themselves. They either try to prevent the court from issuing certain judgments or to deter the court from making future unwelcome decisions.

This part discusses a different form of constraint on the impact of courts. It is focused on the processes that come into play once the court's judgment is already issued. These mechanisms are not intended to shape the court's decisions or to retaliate for its misconduct. Instead, they mitigate the otherwise democratic deliberation-ending influence that final judgments have on society. While the judgment itself is unchanged, these processes may turn its actual impact around. Instead of pre-empting democratic deliberation, the judgment may end up promoting political debate. The sub-parts that follow demonstrate such processes in the executive, legislative, and judicial branches of government.

A. *The Executive Branch*

The CJEU (formerly called the ECJ)[59] was hailed by many as an example of an effective court, a court that had a great impact on the European Union and the states within it.[60] Yet scholars have argued that even

58. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Cal. L. Rev. 899, 944–54 (2005) (separating between such "ex-ante" and "ex-post" mechanisms for constraining courts). For later discussions and examples of such mechanisms, *see* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 Va. J. Int'l L. 631 (2005); Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va. J. Int'l L. 411 (2008); Dothan, *supra* note 16, at 87–101.

59. The court changed its name following an organizational change initiated by the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon on Dec. 13, 2007.

60. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 276 (1997) (arguing that the ECJ managed to compel compliance with its judgment as well as a national court); Karen J. Alter, The European Court's Political Power – Selected Essays 100–01 (2009) (arguing that the ECJ's effectiveness increased due to cooperation with lower national courts that strategically referred to it judgments when they favored its expected decision); J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 Comp. Pol. Stud. 510 (1994) (explaining why national courts, governments and academics did not resist the ECJ and allowed it to increase its power over time); J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403, 2447 (1991) (describing judicial strategies such as incrementalism used by the ECJ to increase its power).

this court cannot compel states to comply directly with its judgments. Rather, a CJEU judgment is only the beginning of a long process. For a judgment to have a real effect on society, it must receive the support of powerful social actors. It must be accompanied by many similar future cases and by political movements that push policy in the same direction suggested by the court. Only in this way can the attempts of the executive to repress the judgment be resisted.[61]

Lisa Conant named this phenomenon "Contained Justice." She gives a powerful example of how this dynamic works within the European Union. The ECJ's *Cassis* decision[62] attempted to accelerate European integration by deciding that goods which are produced and marketed lawfully in one member state could be sold in all other states of the European Union.[63] This decision encroached on states' ability to regulate their own markets and was, at first, practically ignored. When the European Commission intervened and tried to set European policy according to the ECJ's decision, states resisted the change. The public mobilized, with interest groups and organizations fighting either for or against the ECJ's initiative and launching new cases that reached the ECJ. Eventually, a compromise solution was reached that gave states some ability to control their own regulation without external influence.[64] The ECJ's original decision was only partly implemented and only after a long public debate.

One can look at the fact that judgments only have real repercussions if they are followed by a social movement as an indication that international courts are limited in their ability to reshape society. But one can also look at the same phenomenon as an indication that international courts do not hinder public deliberation. Instead, they may propel and increase deliberation. International courts act as the spark that starts a debate. After they issue their judgments, interest groups start to act and shape policy. The judgment can serve as a focal point.[65] It can help wide social groups act together for the same cause. People who would otherwise not know they have a common interest are provided an opportunity to resist the policies of their governments and to collaborate with others in a social struggle.

The pushback against judgments of the CJEU is part of a general framework of regime design across the European Union. Instead of following a classical system of separation of powers whereby each institution

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61. *See* LISA J. CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 32–38 (2002).

62. Case C-120/78, Rewe Zentrale AG v. Bundesmonopolverwaltung für Branntwein 1979 E.C.R. 649.

63. *See* CONANT, *supra* note 61, at 1–2.

64. *See id.* at 11–14.

65. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. J. 723, 759–62 (2009) (explaining how courts, including the ECJ in the *Cassis* case, create focal points for coordination); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1275 (2004) (suggesting that the International Court of Justice can solve conflicts between states by clarifying ambiguities in conventions and creating focal points for cooperation).

has a distinct realm of influence, the European Union is constructed as a complicated system of checks and balances. The constant friction between institutions is used to protect against potential abuses of power.[66]

The resistance to judgments and the countervailing forces that call to implement them spread information to the public about the underlying interests involved.[67] Generally speaking, this can reduce social inequality by letting more people take part in the political process. But courts are doing more than just starting a debate. They are also framing the debate and potentially determining its outcome. Therefore, to the extent that the process before international courts favors certain groups more than others,[68] the outcome of the contestation that follows a judgment is not guaranteed to be egalitarian. But the goal of this paper is not to assess the final impact of judicial intervention on the division of wealth in society. It is to argue that international courts lead to more, rather than less public deliberation; that they involve larger segments of society in the debates that determine their rights.

The CJEU relies on the involvement of the public not just after its judgments are issued. It also benefits from public participation as a method to expose itself to new cases. The CJEU can obtain cases through three channels: (1) a preliminary reference from national courts that refer to it questions of EU law, (2) an infringement case started by the Commission based on a complaint by an individual or an NGO, and (3) an infringement procedure which is started at the initiative of the Commission. Since about 2008, the number of cases started by the Commission has declined steeply, while the number of cases initiated by a preliminary reference from a national court has increased.[69] At the same time, about three-quarters of the cases brought by the Commission have started with a complaint and not on the Commission's own initiative.[70]

These trends clearly show that the Commission is scaling down the use of the "police patrol" model where a centralized agency monitors violations systematically. Instead, the Commission is shifting to a "fire alarm"

66. *See* ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 84 (2012).

67. *See* Eyal Benvenisti, *Judicial Review and Democratic Failures: Minimizing Asymmetric Information Through Adjudication*, 32 TEL AVIV UNI. L. REV 277 (2010) (Hebrew) (demonstrating how adjudication can help spread information to wider social groups in Israel).

68. *See, e.g.,* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974) (arguing that repeat players have an inherent advantage in shaping the law to favor their interests); CONANT, *supra* note 61, at 18–21(arguing that disadvantaged and poor groups cannot always succeed in changing society through the courts); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (arguing more generally that the human rights discourse is not always beneficial for the disadvantaged).

69. *See* Andreas Hofmann, *Legal Rights and Practical Effect: Why the European Commission Supports Access to Justice for interest groups*, 8 (Mar. 2016), https://www.researchgate.net/publication/303459229_Legal_Rights_and_Practical_Effect_Why_the_European_Commission_Supports_Access_to_Justice_for_interest_groups.

70. *Id*. at 3.

model where it receives information on violations from many diverse sources and acts based on this information. The preliminary references route is an even more diversified system because it allows national courts to refer cases to the CJEU and these national courts, in turn, initiate proceedings based on the applications of individuals. The foremost advantage of the "fire alarm" model is that it allows more supervision of violations with a small investment by formal institutions. A "fire alarm" model relies on the incentives of individuals to keep the system working efficiently.[71]

The practice of the CJEU shows that individuals, corporations, or NGOs which disagree with the policies of the executive in their countries are required to act. They cannot just sit back and let an international court do the work for them. They must bring cases to the attention of the CJEU, and they must fight for the implementation of its judgments. The success of the system relies on the willingness of segments of the public to act. It creates incentives and opportunities for people to get involved in politics and thus increases public deliberation.

B. *The Legislative Branch*

There are two ways in which international courts shape the behavior of parliaments. The first is an effect on parliamentary agendas: international courts incentivize parliaments to legislate in order to protect the state's interest. The second is a subtler influence, an influence on the type of arguments used in parliamentary discussions.

Regarding the first type of influence, the legislative changes undertaken by numerous countries following their acceptance of the ICC's jurisdiction is a perfect example. The ICC adopted a rule of admissibility known as complementarity, according to which it will not prosecute suspected war criminals that were investigated or prosecuted in a country with a judicial system that is willing and able to prosecute them itself.[72] Because ICC prosecution can cause enormous damage to the reputation of states, many states have taken steps to prove that they are willing and able to prosecute their own soldiers if they commit crimes. One of these steps is to change national legislation and define as crimes the criminal actions described by the Rome Statute—the treaty that founded the ICC.[73]

Regarding the second type of influence, scholars have investigated the effect that courts such as the CJEU have on parliamentary discussion. These scholars argue that, just like international courts frame debates in the public at large,[74] they can shape the way parliaments discuss issues of legal rights. Parliaments that are exposed to judicial challenges from the CJEU become accustomed to defending their laws by reliance on tech-

71. *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 168 (1984).

72. *See* Rome Statute of the International Criminal Court art.17(a)-(b), July 17, 1998, 2187 U.N.T.S. 90.

73. *See* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 333–37 (2008).

74. *See supra* Part IB.

niques of balancing and proportionality. They ground their provisions in abstract concepts of rights that resemble the reasoning used by constitutional courts.[75]

These two impacts that international courts have on parliaments imply that more legislation will be initiated, leading to more deliberation among the public and its elected representatives. At the same time, they ensure that parliamentary discussions will be framed in a way that stresses individual rights and the tools of constitutional law. Because of this, deliberation in the parliament will be improved in the same way that it is improved in the public at large.[76]

C. *The Judicial Branch*

International courts can improve deliberation indirectly by strengthening national courts. National courts can create friction between social groups, spreading information to wide segments of the public. But national courts are also able to resist foreign influence on the state and make domestic politics meaningful for their countries' policymaking. Understanding how international courts can assist national courts requires reviewing the challenges national courts face.

National judges in democratic countries are often independent from their government. This allows them to make unpopular decisions in some cases.[77] However, the judiciary as a whole cannot ignore public opinion completely.[78] To maintain their legitimacy, national courts cannot clash with their governments on issues that form the core of the governments' agendas.[79] To some extent, national courts are forced to serve their governments' interests.[80]

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75. *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 204 (2000) (describing how parliaments use judicial methods of reasoning to protect their statutes from judicial review).

76. *See supra* note 20; *see also* Kevin L. Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115, 1120 (2015) (showing that even members of the U.S. Congress refer to international law in their deliberations, probably to strengthen the country's international reputation).

77. *See* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. CON. L. 13, 33 (2013) (suggesting that the public wants to be bound by national courts even when the courts make unpopular decisions).

78. *See* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999) (arguing that in the U.S. judges are independent, but the judiciary is constrained by the government).

79. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH – THE SUPREME COURT AT THE BAR OF POLITICS 239 (2d. ed. 1986) (explaining that national courts must avoid making decisions that can lead to too much public resistance); Frederick Schauer, *Forward: The Court's Agenda – and the Nation's*, 120 HARV. L. REV. 4, 44, 59–62 (2006) (arguing that the U.S. Supreme Court focuses on issues that are not of the highest concern for the public at the time in which the judgment is issued).

80. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (showing that the U.S. Supreme Court follows the preferred policies of the elected branches).

Traditionally, governments viewed international law as a threat, something that could limit the ability of the executive to act effectively. Consequently, national courts were called upon to counter this threat by strategically avoiding international law in their judgments.[81] But in today's globalized world, governments are facing powerful external pressures and may use international law to resist these pressures. Governments sometimes want to be bound by the provisions of international law as a mechanism of self-commitment that allows them to defy the wishes of foreign powers.[82] National courts today are called upon not to avoid international law, but to use it as a tool to protect their governments from the demands of other countries.[83]

To constrain their governments effectively and give them the force to resist foreign intervention, national courts need to cooperate with each other and present a united front.[84] Cooperation between national courts is difficult because these courts do not always have an incentive to punish defecting courts and rarely have the means to do so effectively.[85] Fortunately, international courts are sometimes able to improve the cooperation between national courts.

One example of international courts acting as a tool to promote cooperation between national courts is the collaboration between national courts in the Benelux countries and the CJEU. Scholars have argued that the smaller countries in Europe rely on the CJEU to coordinate their resistance against pressures from the bigger economies in the continent. The Dutch and Belgian national courts refer many cases to the CJEU, relative to the size of their national populations, thus allowing the CJEU to become a powerful agent that can protect their governments from foreign pressures.[86]

International courts today are a vital tool to strengthen national courts as they resist foreign pressures. Pressures by foreign governments are the ultimate enemy of healthy public deliberation. These pressures are coordinated by a few powerful countries who are, in turn, directed by small inter-

81. *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L. L. 159, 167 (1993).

82. *See* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 440 (1988) (demonstrating that it is sometimes beneficial to be constrained by someone else to improve your own position in negotiation); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 28 (1960) (explaining the general advantage of commitment as a way to improve one's position in negotiations).

83. *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts,* 102 AMER. J. INT'L L. 241 (2008).

84. *See* Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law,* 20 EUR. J. INT'L L. 59, 65 (2009).

85. *See* Tom Ginsburg, *National Courts, Domestic Democracy and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT'L L. 1021, 1023–26 (2009).

86. *See* Eyal Benvenisti & George W. Downs, *The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions*, 25 EUR. J. INT'L L. 85, 92–93 (2014).

est groups and officials. National courts can reveal hidden facts and force these powers out into the open, where wider segments of the public can identify and resist them.[87] Thus, international courts improve public deliberation indirectly by strengthening national courts and improving their cooperation.

Weak states are threatened not only by foreign governments but also on occasion by international organizations encroaching on state sovereignty and forcing states to change their policies. Organizations such as the United Nations Security Council are controlled by powerful countries, especially the five permanent members of the Council that enjoy a veto power over its decisions. The famous Kadi affair demonstrates how an international court helps states resist the Security Council.

The Kadi affair concerned a suspected member of Al-Qaeda who was subjected to certain measures, including freezing his assets, by the Security Council. In the first *Kadi* judgment, the CJEU annulled the EU regulation that restricted Kadi's rights following the Security Council's resolution because Kadi did not receive a proper hearing.[88] In the second *Kadi* judgment, the CJEU decided that it will only consider information that was revealed to Kadi when determining the risk he poses to society. The court found that the revealed information did not suffice to justify the sanctions levied against Kadi, which were consequently annulled.[89] The *Kadi* cases demonstrate one way in which international judgments can protect all member states of the European Union from the Security Council. They allowed the publics in these states to determine their own fates without being subjected to foreign influence. Furthermore, the judgment specifically addresses the exposure of information and prevents secret proceedings from harming the rights of suspects.

International courts can do even more than minimize the effects of external influence on states. They can have a direct effect on the publics within states and push social groups to action, sometimes even against resistance from the states' national courts. A good example of that is the way the International Court of Justice (ICJ) shaped the internal debate within the United States on the execution of foreigners.

In the *Avena* judgment,[90] the ICJ required the United States to review some convictions of Mexican nationals who were sentenced to death because they were not granted their rights under the Vienna Convention on Consular Relations.[91] Although the U.S. Supreme Court in the *Medellin* case[92] eventually decided that the ICJ judgment had no effect in U.S. do-

87. *See id* at 95.

88. Case C-402/05P, Kadi v. Comm'n, 2008 E.C.R. I-6351.

89. Joined cases C-584/10P, C-593/10P, and C 595/10P, Comm'n v. Kadi, 2013, ECLI:EU:C:2013:176.

90. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 12 (Mar. 31).

91. Vienna Convention on Consular Relations, art. 36, ¶ 1–2, Apr. 24, 1963, 596 U.N.T.S. 261.

92. Medellin v. Texas, 552 U.S. 491 (2008).

mestic law and should be ignored, the ICJ judgment certainly influenced United States politics. In fact, President George W. Bush himself signed a memorandum to the Attorney General stating that the United States would comply with the ICJ's decision.[93] The decision of the Supreme Court to ignore the memorandum sealed the fate of the convicts, but it did not change the fact that the ICJ spurred a political debate, reaching all the way to the highest echelons of power.[94]

III. LAWYERS: THE INVISIBLE COLLEGE REVEALED

In 1977, Oscar Schachter coined the term "the invisible college of international lawyers" to refer to the global community of professional lawyers and scholars that together develop international law.[95] In the twenty-first century, international courts are proving more and more essential for the success of this global community. International courts act as hubs where professional lawyers are trained and where they can network with other lawyers. By strengthening the worldwide network of professional lawyers, international courts give this network the ability to enrich public debate within their countries.

A. *Training International Lawyers*

Many law students today view internships at international courts as a vital part of their legal education. The International Criminal Court offers numerous possibilities for interns and visitors.[96] The International Criminal Tribunal for the Former Yugoslavia (ICTY)[97] and the International Criminal Tribunal for Rwanda (ICTR)[98] also have active internship programs. The CJEU offers traineeships for lawyers and political scientists,[99] as does the ECtHR.[100]

The networks formed and the knowledge acquired during such internships can shape the careers of the global elite of lawyers. For example, the Inter-American Commission on Human Rights—the body which refers

93. President's Determination Regarding U.S. Response to the Avena Decision in the ICJ – Memorandum for the Attorney General, DIG. OF U.S. PRAC. IN INT'L LAW (Feb. 28, 2005), https://www.state.gov/s/l/2005/87181.htm.

94. I thank W. Michael Reisman for this idea.

95. Oscar Schachter, *The Invisible College of International Lawyers*, 72 Nw. U. L. REV. 217 (1977).

96. *See Internships and Visiting Professionals*, INT'L CRIM. CT., https://www.icc-cpi.int/jobs/Pages/internships-and-Visiting-Professionals.aspx (last visited Mar. 21, 2018).

97. *See Employment and Internships*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/employment/internships (last visited Mar. 21, 2018).

98. *See Conditions Governing The ICTR Internship Programme*, INT'L CRIM. TRIBUNAL FOR RWANDA, http://ictr-archive09.library.cornell.edu/default.html (last visited Mar. 21, 2018).

99. *See Traineeships*, CT. OF JUST. OF THE EUR. UNION, http://curia.europa.eu/jcms/jcms/Jo2_7008/traineeships (last visited Mar. 21, 2018).

100. *See Recruitment at the Court*, EUR. CT. OF HUM. RTS., http://www.echr.coe.int/pages/home.aspx?p=employmentandtraineeships&c= (last visited Mar. 21, 2018).

cases to the IACHR—boasts that many of its previous fellows and interns have gone on to defend human rights in their own countries.[101] The IACHR itself also has an internship program that gives selected people valuable knowledge of the Inter-American system for human rights.[102] People who work at international courts understand the way the system works from within and can use that knowledge when they litigate before such courts years later.

Furthermore, international courts are not filled only by judges. Some courts, such as international criminal courts or the ECtHR, have a very large professional staff.[103] In the ECtHR, the legal staff works under the direction of the registrar, not individual judges. Scholars explained that the staff has a substantial influence on the actual judgments of the court. This influence is due in part to the fact that many ECtHR judges are not proficient enough in the use of English and French, the two official languages of the court.[104] The large group of influential lawyers who are reared within international courts will continue to cast their impact on international law throughout their professional life.

Finally, international courts provide an opportunity for litigators to establish their names and build an expertise in appearing before specific courts. Many of the expert litigators are "repeat players"—they continuously litigate before the same court.[105] There are even people who manage to switch roles during their career, working at the court for several years and later representing their governments before the same court or accepting an academic position.[106] These people who know international courts inside and out are the ambassadors that push the principles and ways of reasoning from international courts to the discourse in their home countries.

B. *Lawyers in the Domestic Arena*

Despite the important influence that international courts have on the lawyers they cultivate, their chief impact on public deliberation is probably through the lawyers that are recruited to resist them. Vibrant law is a re-

101. *See Internships*, INTER-AM. COMMISSION ON HUM. RTS., http://www.oas.org/en/iachr/employment/internships.asp (last visited Mar. 21, 2018).

102. *See* Huneeus, *supra* note 46, at 530; *Internship and Visiting Professional Program,* INTER-AM. CT. OF HUM. RTS., http://www.corteidh.or.cr/index.php/en/about-us/programa-pasantias (last visited Mar. 21, 2018).

103. STÉPHANIE CARTIER & CRISTINA HOSS, *The Role of Registries and Legal Secretariats in International Judicial Institutions, in* THE OXFORD HANDBOOK OF INT'L ADJUDICATION (Cesare P.R. Romano ET AL. eds., 2013) 712, 713-714 (counting the hundreds of professionals who work in these courts).

104. *See* Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S. FLA. L. REV. 1, 26–31 (2005).

105. *See* Antoine Vauchez, *Communities of International Litigators*, *in* THE OXFORD HANDBOOK OF INT'L ADJUDICATION 655, 657 (Cesare P.R. Romano ET AL., eds., 2013).

106. *Id.* at 661.

sult of perpetual struggle,[107] and it is the struggle of domestic bodies against international courts that forms the latter's most significant contribution to society.

For example, states have reacted to the possibility of ICC prosecution against their soldiers and officers by creating large bureaucracies of legal experts to advise their militaries.[108] These advisers are hired, in part, to defend the state from international prosecution. In the process, they substitute the discretion of combatants in ways that can lead, according to some scholars, to more rather than less war crimes.[109] Nevertheless, these lawyers remain influential players in their respective states for many more years. Scholars who have studied the long-term influence of lawyers on their governments generally conclude that lawyers can help protect democracy, liberal values, and the rule of law.[110] The ICC therefore fortifies the legal community in numerous states and allows it to create the conditions that will ensure vibrant public deliberation in the future.

Besides training lawyers and spurring states to train lawyers as a counterforce, international courts also cooperate with domestic lawyers and empower them. The IACHR, for example, has been ordering states to investigate severe human rights violations and supervising the criminal process within states.[111] Through its guidance, the IACHR improves the quality of legal systems under its jurisdiction, sometimes even by specifically requiring relevant legal training by government officials.[112] This fosters the necessary conditions for functioning democratic regimes across the region.

C. *Scholars*

Legal academia has manifested a persistent and growing interest in international courts. Large research centers such as the Centre on International Courts and Tribunals at University College London, iCourts at the University of Copenhagen, and PluriCourts at the University of Oslo have been created specifically to study international courts. The literature on

107. RUDOLPH VON JHERING, THE STRUGGLE FOR LAW 138 (John J. Lalor trans., The Lawbook Exchange, Ltd. 2d. ed. 1915).

108. *See, e.g.,* Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 CONN. J. INT'L L. 367, 398–402 (2011) (demonstrating how legal advisers shape the behavior of combatants).

109. *See* Or Bassok, *Missing in Action: The Human Eye*, *in* CONSTITUTIONS ACROSS BORDERS IN THE STRUGGLE AGAINST TERRORISM 283–84 (Federico Fabbrini & Vicki C. Jackson eds., 2016).

110. *See* Terence C. Halliday, Lucien Karpik & Malcolm Feeley, *Introduction—the Legal Complex in Struggles for Political Liberalism, in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL CHANGE 1–9 (Terence C. Halliday, ET. AL. eds., 2007).

111. *See* Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 1–2 (2013)

112. *See id.* at 20–22.

international courts is booming, and they are subjected to increasingly sophisticated analyses.[113]

The scholarly interest aroused by international courts is conducive to an informed discussion of the issues on their agendas. Landmark cases of international courts are becoming synonymous with legal principles that shape academic discourse.[114] New cases are often at the center of academic attention. They are summarized in journals such as the American Journal of International Law and inspire discussions in legal blogs.[115] In this way, international courts are inspiring an active scholarly debate that involves lawyers as well as political scientists and international relations experts. The scholarly discussions trickle down and affect political deliberation world-wide.[116]

Scholars have argued that international courts such as the CJEU owe a large measure of their success to the constant promotion of their ideas by academics.[117] The symbiosis between scholars and judges is the key to forming so-called "epistemic communities" around international courts—networks of professionals armed with specialized knowledge that can use this knowledge to shape policymaking.[118]

Conclusion: Improvement by Dialogue

The key to sustaining a stable democracy is an informed public. Without an informed public, small interest groups can capture the government and take advantage of the rest of the population.[119] Public deliberation, in turn, is essential for informing the public, but such deliberation is often hard to achieve.

Rational people have an incentive to invest their energy in choices that affect their own lives, such as choosing where to live or what computer to buy, and not in political debates that offer virtually no chance of

113. *See, e.g.,* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 Am. J. Int'l L. 1, 16–19 (2012) (for a review of empirical studies on international courts).

114. *See* Antoine Vauchez, *EU Law Classics in the Making: Methodological Notes on* Grand Arrêts *at the European Court of Justice, forthcoming in* EU Stories: Contextual and Critical Histories of EU Jurisprudence 21, 21 (Fernanda Nicola & Billy Davies eds., 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752364.

115. *See, e.g.* Marko Milanovic, Blog of the Eur. J. of Int'l L. (June 23, 2016), http://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/.

116. For evidence of general public interest in international courts measured by newspaper articles and google searches, see *supra* note 9, at 420–21.

117. *See* Vauchez, *supra* note 105, at 665.

118. *See* Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Int'l Org. 1, 3 (1992) (defining epistemic communities and exploring their impact on policy); Niilo Kauppi & Mikael Rask Madsen, *Transnational Power Elites: The New Professionals of Governance, Law and Security*, *in* Transnational Power Elites: The New Professionals of Governance, Law and Security 6 (Niilo Kauppi & Mikael Rask Madsen eds., 2013) (explaining how a transnational power elite can exercise power through its expertise, the spreading of its institutional culture, and the network it creates).

119. *See supra* note 13.

improving their personal well-being.[120] Politics is sometimes appealing to people, but when large segments of the public realize how hard it is to make a difference, they often turn their attention to their own private lives.[121] It is therefore essential to design institutions that keep public deliberation going.

The goal of this paper is to demonstrate that international courts can do exactly that. It refutes the simplistic view under which every decision made by an international court is taken out of the public debate. Instead, the paper argues that judgments of international courts can spur political debates and provide conditions that make these debates more vibrant and constructive for social change.

International courts furnish legal arguments that help the people understand their rights. They cultivate networks within the public that improve the flow of accurate information about human rights violations. International courts mobilize the public to counter resistance by the executive branch. They motivate parliaments to act, and they increase the ability of national courts to protect wide segments of the public. Finally, international courts foster global and domestic elites of lawyers who can enhance the public's ability to fight for their rights.

All this does not mean that intervention by international courts is always an unmitigated good. Judicial intervention can very well be unnecessary, biased, or harmful.[122] But taking the arguments in this paper seriously does imply that examining the costs and benefits of action by international courts must be much more refined. International courts are not constructed to provide final answers to burning social questions. They engage in an ongoing dialogue with the public and with all domestic branches of government. This dialogue has a crucial positive side effect—it invigorates public deliberation.

120. *See* BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY 8 (2004).

121. *See* ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION 10 (1979) (explaining how and why the public oscillates between being involved and disengaging from political debates).

122. *See* MATTHEW PARISH, MIRAGES OF INTERNATIONAL JUSTICE: THE ELUSIVE PURSUIT OF A TRANSNATIONAL LEGAL ORDER VI (2011) (arguing that international courts try to build their own strength and serve the interests of the powerful); ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 166–67 (2009) (arguing that international judges often make biased decisions).